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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 46A05-0603-CR-156
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable Kathleen B. Lang, Judge
Cause No. 46D01-0404-FB-72

April 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Michael Jones appeals his twenty-three-year sentence for Class B felony aggravated assault and Class D felony criminal mischief. We affirm.

Issue

Jones raises two issues, which we consolidate and restate as whether he was properly sentenced.

Facts

On April 27, 2004, Jones hit his wife, Latasha Kendrick, with a car, causing multiple compound fractures of both of her legs and pelvis. During the incident, Jones also struck another woman's house with his car.

On April 30, 2004, the State charged Jones with Class B felony aggravated battery and Class D felony criminal mischief. On December 9, 2004, Jones pled guilty to the charges. On January 20, 2005, a sentencing hearing was held, and Jones was sentenced to twenty years on the Class B felony conviction and three years on the criminal mischief conviction. The trial court ordered the sentences to be served consecutively for a total sentence of twenty-three years. Jones eventually sought and was granted permission to file a belated appeal. Jones now appeals his sentence.

Analysis

Jones first appears to argue that he was sentenced in violation of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). Although his argument is unclear, he seems to contend that because he did not admit to the facts used to aggravate his

sentence, the trial court improperly enhanced his sentence. However, Jones's written plea agreement provides in part:

> The Defendant acknowledges that he understands his right to a jury trial not only with respect to a determination of his guilt, but also with respect to any sentencing factors that may have been used to enhance sentencing beyond the presumptive sentence. The Defendant while executing this Plea Agreement hereby expressly waives the right for a jury to determine any sentencing factors . . . .

App. pp. 14-15. Because Jones expressly waived his right to have the aggravating circumstances found by a jury, the trial court properly made such findings. Jones has no Blakely claim.

Jones then argues that the trial court improperly considered the aggravating and mitigating circumstances when it sentenced him.[1] Sentencing decisions lie within the discretion of the trial court. Patterson v. State, 846 N.E.2d 723, 727 (Ind. Ct. App. 2006). If a trial court enhances or reduces a presumptive sentence, it must: (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate its evaluation and balancing of the circumstances. Id.

Jones suggests that the trial court should have considered his guilty plea, mental illness, and substance abuse as mitigating circumstances. The finding of mitigating circumstances is within the trial court's discretion. Cotto v. State, 829 N.E.2d 520, 525

[1] We note that Jones committed this offense and was sentenced prior to the April 25, 2005, changes to Indiana's sentencing scheme. Because the parties do not argue otherwise, we will review Jones's sentence for an abuse of discretion in accordance with the former presumptive sentencing scheme.

(Ind. 2005). A trial court need not weigh or credit the mitigating factors in the same manner as a defendant suggests; however, when a trial court fails to find a mitigating circumstance that the record clearly supports, a reasonable belief arises that the mitigator was improperly overlooked. Id.

Regarding the guilty plea,[2] "Our courts have long held that a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return." Cotto, 829 N.E.2d at 525. "A guilty plea demonstrates a defendant's acceptance of responsibility for the crime and at least partially confirms the mitigating evidence regarding his character." Id. Although Jones pled guilty in an "open plea," we do not equate Jones's admission at the guilty plea hearing that he intentionally committed the crimes with him accepting responsibility for hitting his wife with a car and seriously injuring her. In fact, in the pre-sentence investigation report, Jones's statements to mental health evaluators, and even his pro se appellant's brief, Jones claims that he blacked out and cannot recall hitting his wife with the car. Thus, to a certain extent, Jones continues to deny culpability for his crimes. Accordingly, we cannot conclude that, under these facts, Jones's guilty plea is worthy of significant mitigating weight.

Likewise, we cannot conclude that the trial court abused its discretion in declining to give significant mitigating weight to Jones's mental disability and substance abuse. Although both are serious issues, they are not automatically mitigating. While the charges were pending against Jones, he underwent evaluations by three mental health

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[2] The State does not make any argument regarding Jones's guilty plea as a mitigating circumstance.

professionals and was diagnosed with bi-polar disorder mixed with "psychotic features." App. p. 35. However, all three also concluded that Jones was competent to stand trial and one evaluator even concluded, "It is suspected that Mr. Jones may be exaggerating or fabricating his inability to recall events associated with the alleged offense." Id. at 38. Further, although Jones appears to have an extensive history involving substance abuse, at the time of the incident, Jones had only consumed two beers. As one evaluator explained, Jones "would not [have been] intoxicated at the time of the accident." Id. at 44. Because the extent of these alleged mitigating circumstances is not clearly supported by the record, Jones has not established that they were improperly overlooked or that they are entitled to significant mitigating weight.

It appears that the trial court considered as aggravating circumstances the nature and circumstances of the offense,[3] that Jones posed a threat to the community, and his criminal history.[4] Kendrick was riding in a car with her mother and her mother's boyfriend, Marvin Bowers, when Jones, from whom she had been separated for approximately a month, began following the vehicle. Bowers was driving the car and

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[3] Jones cites Hampton v. State, 719 N.E.2d 803, 808 (Ind. 1999), for the proposition that the seriousness of the crime may not support consecutive sentences. In looking at the cases upon which Hampton relies, however, we believe Hampton stands for the proposition that a trial court may consider as aggravating that a reduced sentence might depreciate the seriousness of a crime only when it contemplates the imposition of a sentence less than the presumptive. See Mitchem v. State, 685 N.E.2d 671, 679 (Ind. 1997). This factor is not at issue here. Besides, it is well-settled, "The nature and circumstances of a crime is a proper aggravator so long as the trial court takes into consideration facts not needed to prove the elements of the offense." Edwards v. State, 854 N.E.2d 42, 51 (Ind. Ct. App. 2006).

[4] In its written sentencing statement, the trial court stated that it found the aggravating circumstances listed in the State's "Notice of Aggravating Circumstances." Supp. App. p. 8. This notice was not included in Jones's appendix. We glean the aggravating circumstances from the trial court's oral recitation of Jones's sentence at the sentencing hearing.

tried to avoid Jones, but Jones continued to chase their car. Bowers stopped the car, and the passengers exited and fled on foot. Jones pursued Kendrick, "leaving the street, crossing a sidewalk and striking her in the yard. After hitting [Kendrick] the force carried him into the house. Michael then backed out and fled." Id. at 40. Not only did Jones injure Kendrick and damage a house, his actions posed great danger to the other passengers of the car and the people on the street and in the house. We conclude that the nature and circumstances of the offense warrants significant aggravating weight.

Further, there appears to be history of violence and harassment between Kendrick and Jones, so much so that Kendrick had obtained a restraining order against Jones. The history of disputes between Kendrick and Jones supports the trial court's finding that Jones posed a threat to the community, and more specifically to Kendrick, as an aggravating circumstance. Finally, although Jones does not have an extensive criminal history, he has a felony conviction for attempted criminal sexual assault[5] and several arrests. This conviction warrants some aggravating weight. Given the aggravating and mitigating circumstances in this case, it was within the trial court's discretion to conclude, "Whatever mitigating circumstances there are, are far outweighed by the aggravating circumstances."[6] Tr. pp. 11-12.

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[5] Although the State asserts, and the pre-sentence investigation report ("PSI") generally indicates, that Jones was also convicted of felony "possession of cocaine with intent," this conviction is not included in the individually enumerated list of offenses also contained in the PSI. App. p. 26. We err on the side of caution and will consider only the attempted criminal sexual assault conviction.

[6] The State addresses the appropriateness of Jones's sentence pursuant to Indiana Appellate Rule 7(B). However, because Jones does not make a specific argument regarding the appropriateness of his sentence,

Jones also argues that his conduct amounts to a single episode of criminal conduct. He appears to be arguing that, as such, the trial court improperly imposed consecutive sentences. Jones relies on Indiana Code Section 35-50-1-2(c), which now[7] provides in part:

> The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 and IC 35-50-2-10, to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

Even assuming this incident is a single episode of criminal conduct, the trial court was entitled to impose consecutive sentences. See Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005) ("When sentencing a defendant on multiple counts, an Indiana trial judge may impose a consecutive sentence if he or she finds at least one aggravator."), cert. denied, 126 S. Ct. 545. As the State asserts, aggravated battery is defined as a crime of violence, accordingly the trial court was entitled to order the sentences to run consecutively for a

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we need not address it. Nevertheless, given the nature of the offense and the character of the offender, we believe Jones's sentence is appropriate.

[7] At the time Jones was sentenced, the statute referred to presumptive sentences but was otherwise substantively similar to the wording of the current version. See Hope v. State, 834 N.E.2d 713, 716 n.1 (Ind. Ct. App. 2005)

total sentence of twenty-three years.[8] See Ind. Code § 35-50-1-2(a)(6). Thus, the aggravating circumstances also support the imposition of consecutive sentences.

Conclusion

Jones specifically waived any Blakely claim when he pled guilty. The trial court properly considered the aggravating and mitigating circumstances when it sentenced Jones to enhanced sentences. Indiana Code Section 35-50-1-2 does not limit the trial court's ability to sentence Jones to consecutive sentences. We affirm.

Affirmed.

BAILEY, J., and VAIDIK, J., concur.

[8] Because aggravated battery is defined as a crime of violence, the State contends, "the only restriction upon the court would have been to limit its aggregate sentence to the presumptive sentence for a Class A felony, or a total term not exceeding the presumptive sentence for a felony which is one (1) class higher than the B felony committed by the Defendant." Appellee's Br. p. 15. However, we read the Indiana Code Section 35-50-1-2(c) to mean that when a defendant commits crimes of violence, there is no limit on the term of the consecutive sentences and that when a defendant's crimes are non-violent, he or she may be sentenced to consecutive sentences not in excess of the advisory sentence for the next highest class of felony.